MAXISEGAR SDN BHD

v.

SILVER CONCEPT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YUSOFF J
[CIVIL SUIT NO: S3-22-600-1997]
7 MARCH 2001

CONTRACT: *Frustration - Inability to obtain loan - Whether amounts to - Whether this made performance of agreement impossible or radically different - Whether agreement was conditional - Whether plaintiff to bear the consequences of the risk - Breach - Whether there was breach of contract - Claim for specific performance - Whether just - Claim for breach of contract - Whether allowed*

By an agreement ('the agreement') between the two parties, the plaintiff in this case had agreed to purchase land ('the said land') from the first defendant and had paid a certain amount of deposit. The balance sum was to be paid by the plaintiff after it could obtain a loan which the plaintiff failed to do so. The main ground of the plaintiff's action is that the agreement has been frustrated by reason of its inability to obtain the said loan due to the economic recession and also Bank Negara Malaysia's (BNM) circulars restricting the local financial institutions and banks from giving out loans for purposes as required by the plaintiff. Therefore the plaintiff argued that the supervening events by the BNM had made the performance of the agreement by the plaintiff impossible or radically different from that contemplated or frustrated.

The first defendant however contended that the plaintiff's inability to obtain the said loan should not lead to a frustration of the agreement because the subject matter had not changed in character. The first defendant on the other hand claimed for specific performance of the agreement or alternatively, damages for breach of contract.

Held:

[1] There was no provision in the agreement to say that the agreement was conditional upon the plaintiff getting a loan in order to perform its obligations under the agreement. The court could only construe the terms of the agreement as contained in the agreement.

[2] When the plaintiff entered into this agreement, it took the risk of hoping to get a loan. When it failed to get the said loan, then it would have to bear the consequences of the risk. The said land was still available for the plaintiff and the first defendant was still ready and able to sell it to the plaintiff. It was the plaintiff's misfortune that it could not get the loan it had hoped for. For the above reasons, it could not be said that the contract has been frustrated.

[3] As to the first defendant's counter-claim, an order for specific performance may not be just in view of the plaintiff's inability to pay the balance. However, the first defendant's claim for breach of contract was allowed.

[Plaintiff's action dismissed with costs.]

Case(s) referred to:

Amalgamated Investment & Property Co Ltd v. John Walker & Sons Ltd [1977] 1 WLR 164 ***(refd)***

Davis Contractors Ltd v. Fareham Urban District Counsel [1956] AC 696 ***(refd)***

Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164 ***(refd)***

Ramli Zakaria & Ors v. Government of Malaysia [1982] 2 MLJ 257 ***(refd)***

Universal Corporation v. Five Ways Properties Ltd [1979] 1 All ER 552 ***(refd)***

For the plaintiff - Joginder Singh (CT Annathurai); M/s Syarikat Joginder Singh
For the defendant - VK Lingam (Thayalan); M/s VK Lingam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Yusoff J:

The plaintiff has taken out a writ action against the defendant seeking *inter alia*:

1. A declaration that the agreement between the plaintiff and the first defendant has been frustrated and consequently the plaintiff is discharged from its obligations to perform the agreement.

2. In consequence thereof for an order that the first defendant refund the total sum of RM42,071,200 together with interest to the plaintiff.

3. An injunction against the second defendant restraining the second defendant from parting with the sum of RM20,364,080 held by them as stakeholders until the trial of this action.

a **Brief Facts**

By an agreement in writing dated 31 March 1997 (the agreement) the first defendant agreed to sell and the plaintiff agreed to purchase about 1142.48 acres of land (the said land) in Ulu Selangor for a price of RM217,071.200.

b The plaintiff had paid an earnest deposit of RM4 million and a further deposit of RM17,707,120 to the first defendant. On 21 March 1998 both parties agreed that the other sum of RM20,364.080 plus interest be paid into court as stakeholders money. Therefore the total sum paid by plaintiff to date is RM42,071,200. The balance sum of RM175 million outstanding according to
c the plaintiff, was to be paid by the plaintiff after it could obtain a loan. But the plaintiff failed to get the loan from any financial institution. Consequently, the plaintiff wrote to the defendant on 13 December 1997 informing the first defendant that it had failed to raise the said loan to enable the plaintiff to complete the purchase of the said land. Attempts by the parties to resolve this
d balance of payment also came to naught. Thereafter the plaintiff took out this action for the orders as stated earlier above.

Submissions

The main ground of the plaintiff's action is that the agreement has been
e frustrated by reason of its inability to get the said loan due to the economic recession and also Bank Negara Malaysia's (BNM) circulars restricting the local financial institutions and banks from giving out loans for purposes as required by the plaintiff. Learned counsel for the plaintiff referred to the case of *Davis Contractors Ltd v. Fareham Urban District Counsel* [1956] AC 696
f at p. 729; p. 43C where Lord Radcliffe said:

> Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

g It was submitted in the instant case, that the intention of the plaintiff in purchasing the land for the purpose of developing the said land into a small township and to obtain a loan to complete the purchase was made known to the first defendant. This was even referred to in the agreement *vide* cl. 4.6 which ends with "The parties hereto hearby agree that the loan shall not be
h in excess of eighty per centum (80%) of the purchase price."

Due to the worsening economic and financial conditions facing the country BNM had issued several circulars to the local financial institutions containing restrictions on advances to the property sector. This culminated in the BNM
i circular dated 16 February 1997 whereby BNM prohibited financial institutions

from lending money "to property projects where construction has not started, including for the construction of low and medium cost residential properties costing RM50,000 and below." Because of this circular, the plaintiff's main financier, that is, Arab Malaysian Merchant Bank Berhad who had agreed to syndicate a loan for the plaintiff to enable plaintiff to pay the balance of the purchase price of the land to the first defendant, failed to do so. Therefore the plaintiff argued that the supervening events by BNM had made the performance of the agreement by the plaintiff impossible or radically different from that contemplated or frustrated.

The first defendant however contends that the plaintiff's inability to get the said loan should not lead to a frustration of the agreement because the subject matter has not changed in character. The first defendant on the other hand asks for a specific performance of the agreement or alternatively, damages for breach of contract.

Findings

From the evidence adduced before the court during the trial, it is clear that the plaintiff intended to get a loan in order to pay off the balance sum. But unfortunately for the plaintiff, the economic recession had set in at that material time. This together with BNM's circulars which were not in the plaintiff's favour, led to the plaintiff's inability to secure the requisite loan to enable it to complete the purchase of the said land. In the case of *Universal Corporation v. Five Ways Properties Ltd* [1979] 1 All ER 552, the CA in referring to the doctrine of frustration said at p. 554 as follows:

> The judge dealt with the topic of frustration quite shortly. He said:
>
> > But quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.
>
> That seems to me to be an accurate and proper statement ... .

However, there is no provision in the agreement to say that the agreement is conditional upon the plaintiff getting a loan in order to perform its obligation under the agreement. The defendant on the other hand is ready, willing and able to perform its part of the agreement. The court can only construe the terms of the agreement as contained in the agreement. The court cannot put in terms which have not been agreed upon by the parties. Hashim Yeop Sani CJ (Malaya) in the case of *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 at p. 168 said:

> Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it.

When the plaintiff entered into this agreement, it took the risk of hoping to get a loan. When it failed to get the said loan then it would have to bear the consequences of the risk. In the case of *Amalgamated Investment & Property Co Ltd v. John Walker & Sons Ltd* [1977] 1 WLR 164 Buckley LJ at p. 173-174 stated:

> But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk is a loss which must lie where it falls.

The said land is still available for the plaintiff. The first defendant is still ready and able to sell it to the plaintiff. It is the plaintiff's misfortune that it could not get the loan it hoped for. In *Ramli Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257 the Supreme Court held at p. 262 as follows:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

For the above reasons, it cannot be said that that the contract has been frustrated. As such, the plaintiff's action is dismissed with costs.

As to the first defendant's counter-claim, an order for specific performance may not be just in view of the plaintiff's inability to pay the balance.

Regarding damages for breach of the agreement:

> Clause 10.1 of the agreement provides that in the event of any breach by the purchaser of any provisions of the agreement, the vendor, that is, first defendant shall be entitled to:
>
> 1. forfeit the first instalment.
>
> and
>
> 2. The sum equivalent to 11% per annum on the third instalment or portion thereof remaining unpaid/outstanding, calculated from the due date until the date of forfeiture by way of agreed liquidated damages.

Under the agreement:

The first instalment paid was RM21,707,120

The third instalment due was RM130,242,720

I would therefore allow the first defendant's claim for breach of contract by the plaintiff for the forfeiture of the first instalment and a further sum equivalent to 11% per annum on the third instalment of RM130,242,720 calculated from the due date 30 September 1997 until the date of such forfeiture, that is today. This amount can be utilised from the stakeholders sum plus interest (of RM21,954,318.45) which was paid into court by way of set off and the amount deposited in court together with all interest therein be released to the first defendant.